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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE PIMENTEL,

Defendant and Appellant.

C069920

(Super. Ct. No. SF113235A)

Defendant Jose Pimentel pleaded guilty to possession of heroin for sale (Health & Saf. Code, §11351). The trial court imposed a three-year state prison term, stayed execution of sentence, and placed defendant on five years’ formal probation. One of the conditions of probation was defendant’s completion of a specified drug treatment program. When defendant failed to enroll in the program, the trial court found him in violation of probation and ordered execution of the previously imposed sentence.

On appeal, defendant contends the trial court abused its discretion in revoking his probation. He also contends he should be serving his time in county jail, rather than state prison, pursuant to the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 15, § 1). We affirm.

BACKGROUND

On June 24, 2010, defendant pleaded guilty to possession of heroin for sale (Health & Saf. Code, §11351) -- a crime which occurred on October 22, 2009. Sentencing took place on March 9, 2011. The probation report recommended against probation but the trial court indicated it would be willing to suspend execution of the midterm sentence on the condition defendant complete a treatment program. Defense counsel stated the program that was contemplated was the His Way Recovery House (His Way). Defense counsel had already contacted "Brother Al," of His Way, to facilitate defendant's entry into program.

The trial court imposed the midterm of three years, suspended execution of sentence and placed defendant on five years' probation. Among the conditions of probation, defendant was required to complete the one-year residential His Way program (as well as subsequent after care) and to serve 365 days in jail (with credit for 90 days served). The jail time, however, was modifiable to time in the His Way program, as defendant was to be released from custody to the His Way program as soon as a bed was available. Defendant was also to report to probation on May 4, 2011 -- a date the trial court expressly contemplated would be after defendant's first couple of months at His Way.

Defendant was released from jail on July 6, 2011. On September 19, 2011, the probation department filed a petition for violation of probation, alleging defendant failed to enroll in and successfully complete the His Way program, and failed to obey reasonable directions of the probation officer by failing to contact the His Way program as instructed. A contested hearing ensued.

Senior Deputy Probation Officer Steve Berchtold testified that defendant was released from county jail on July 6, 2011, and saw his probation officer on August 22, 2011. Defendant was told to enroll in and complete the His Way program; he replied that Brother Al visited him in county jail and said that the program would cost \$12,000,

which defendant could not afford. The officer directed defendant to request a court date because he was in violation of his probation.

Defendant's file was then transferred to Berchtold. Berchtold contacted Brother Al, who said defendant should have been released directly to His Way, and agreed to allow defendant to report to the program on September 12, 2011. Berchtold completed the referral to His Way, and mailed a copy to defendant on August 26, 2011, sending it to the address he gave to the probation department.

Defendant reported to Berchtold on September 6, 2011. Berchtold told defendant that he had to report to His Way even though he had a court date regarding the matter. Defendant appeared at the September 14, 2011, court date, but Berchtold had not received any information on defendant's status from His Way. Berchtold requested a status report from Brother Al, who replied on September 12, 2011, that defendant was not a resident of His Way, and they had no file on him. Berchtold then filed a probation violation.

Defendant testified that he met with Brother Al within two weeks of his March 9, 2011, sentencing. Brother Al, who learned from defendant's prior attorney that defendant had assets, told defendant he would have to pay \$12,000 to be in the program, with \$500 a month payments. Defendant said he could not afford this, and Brother Al told defendant to contact him if defendant changed his mind.

According to defendant, Brother Al was supposed to contact defendant's attorney, but did not. On March 27, 2011, a county jail officer told defendant he had been deleted from the program, and gave defendant an "out date" of August 2, 2011. Defendant received a letter from the probation department after his July 6, 2011, release, and met the probation officer on the appointed day, August 22, 2011. Defendant told the probation officer what happened with Brother Al. The probation officer told defendant he would have to get back on calendar so he could explain the matter to the court. On the advice of the probation officer, defendant requested a court date and appeared in court on

September 14, 2011. He was then directed to return on September 21, 2011. Defendant returned to court that day, and was placed in custody.

Defendant intended to get himself excused from attending His Way when he set the court date. He thought that he would be excused from the program if he served a year in county jail.

Defendant admitted getting a letter stating he had to report to His Way on September 12, 2011. Defendant contacted the program at the beginning of September. He got a referral from Berchtold about a week later, but did not go to His Way.

The trial court remarked that while defendant may have been confused as to when he had to start the program or if he had to attend the program if he completed his jail term, the suspended prison sentence was “the prize” for defendant completing the program. It found that defendant got a referral to His Way from Berchtold, but did not attend the program even though he had set a court date. Any problems he might have had with money had to be resolved after -- the court reporter apparently mistranscribed or the court apparently misspoke the word, “after” -- he completed the program, so the court could see defendant’s willingness to complete the program. Accordingly, the trial court found defendant violated his probation by not attending the program.

DISCUSSION

I

Defendant contends it was an abuse of discretion for the trial court to revoke his probation. Relying on *People v. Zaring* (1992) 8 Cal.App.4th 362 (*Zaring*) and *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*), defendant argues that it was an abuse of discretion to revoke his probation for the “technical violation” of not going to the His Way program two days before his court date. We disagree.

A trial court has “very broad discretion in determining whether a probationer has violated probation.” (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443.) We will not disturb a trial court’s determination to revoke probation absent an abuse of that

discretion. (*Id.* at p. 442.) The facts supporting the revocation must be proven by a preponderance of the evidence, and the decision to revoke will be upheld if supported by substantial evidence. (*Id.* at p. 447.)

Neither *Zaring* nor *Buford* supports defendant's position. In *Zaring*, the trial court found that the defendant had not willfully violated her probation when she was confronted with last minute, unforeseen circumstances and her conduct did not show irresponsibility or disrespect for court orders. (*Zaring, supra*, 8 Cal.App.4th at p. 379.) The Court of Appeal noted that there was nothing in the record to support a conclusion that defendant's conduct "was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*Ibid.*)

In *Buford*, the sentencing judge told defendant simply to "bear in mind" Penal Code section 290's sex offender registration requirement while directing defendant's probation officer to ensure his compliance with it. (42 Cal.App.3d at p. 986.) Defendant's probation was later revoked for failing to register, despite the absence of evidence the probation officer followed the court's directive. *Buford* reasoned, "[t]o revoke [the defendant's] probation for his noncompliance with [Penal Code] section 290, while excusing the noncompliance of the sentencing court, the jail officials, and/or the probation officer constituted an abuse of discretion." (*Id.* at p. 987.)

This case does not present the situations addressed in *Zaring* or *Buford*. Defendant's failure to attend the His Way program was intentional; he admitted setting the court date with the intent of getting out of the program. Neither the probation officer nor the trial court ever excused defendant from attending the program. Defendant had been directed to go to His Way, and was given a referral for the program.

Defendant was the beneficiary of a very lenient plea agreement. Convicted of a serious narcotics offense, possession of heroin for sale, and having acquired 10 prior felony convictions, defendant was sentenced to state prison, that sentence was suspended, and he was placed on probation. Central to this generous grant of leniency was his

enrolling in and completing the treatment program. Defendant nonetheless failed to enroll in and complete the program and arranged a court date in the hope of getting out of the requirement. It was not an abuse of discretion for the trial court to revoke defendant's probation and to execute the previously imposed state prison sentence under these circumstances.

II

Defendant contends he should have been sentenced to county jail rather than state prison because the state prison sentence was executed after the effective date of the Realignment Act. We disagree.

With certain exceptions, felons sentenced under the Realignment Act are committed to county jail rather than state prison, may have a concluding portion of their sentence suspended in lieu of probation, and are not subject to parole. (Pen. Code, §§ 3000 et. seq., 1170, subd. (h)(1)-(3), (5); further undesignated section references are to this code.) But state prison sentences must be imposed for felons who have current or prior serious or violent felony convictions, who are required to register as sex offenders, or who have sustained a section 186.11 aggravated white collar crime enhancement. (§ 1170, subd. (h)(3).) Defendant's crime in this case is not among the crimes exempted from a jail commitment under the Realignment Act.

The Realignment Act's sentencing scheme applies to defendants sentenced on or after October 1, 2011. (§ 1170, subd. (h)(6).) Previously, on March 9, 2011, after defendant's guilty plea, the trial court imposed a three-year state prison sentence and suspended execution of sentence. After revoking probation, the trial court executed the prison term on November 28, 2011. Defense counsel requested that defendant serve the state prison term in county jail pursuant to the Realignment Act, but the trial court disagreed.

Although sentenced to state prison on March 9, 2011, before Realignment Act's effective date, defendant asserts his "final judgment" took place on November 28, 2011,

after the Realignment Act's effective date became effective on October 1, 2011, when the trial court imposed the previously suspended state prison term, and is therefore subject to the Realignment Act's unique sentencing scheme. He claims this approach is consistent with the legislative intent behind the Realignment Act, since his interpretation would lead to more county jail commitments and fewer prison commitments. He also contends any ambiguity in the Realignment Act should be resolved in his favor.

We recently rejected similar arguments in *People v. Wilcox* (2013) 217 Cal.App.4th 618. We reject defendant's contentions for the reasons stated in *Wilcox*.¹

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

RAYE, P. J.

DUARTE, J.

¹ We ordered supplemental briefing to address *People v. Clytus* (2012) 209 Cal.App.4th 1001, a case decided after briefing in which Division Eight of the Second District Court of Appeal held that a state prison sentence imposed and stayed before October 1, 2011, but executed on or after that date, is subject to the Realignment Act's county jail provisions. We decline to follow the holding in *Clytus* for the reasons stated in *Wilcox*.